UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Michael Ferguson, Plaintiff, v. Walmart, Defendant.	CV 12-04434 RSWL (Ex) **ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** [27]

Currently before the Court is Defendant Walmart's ("Defendant") Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment [27]. The Court, having reviewed all papers submitted pertaining to this Motion, **NOW FINDS AND RULES AS FOLLOWS:** The Court **GRANTS in part and DENIES in part** Defendant's Motion for Summary Judgment, or in the Alternative, Partial

Summary Judgment.

I. BACKGROUND

Plaintiff Michael Ferguson ("Plaintiff") was hired as a "truck unloader" by Defendant on or about February 21, 2007. Defendant's Statement of Uncontroverted Facts ("SUF") # 39. Plaintiff alleges that starting on or about February 2008 to about March 2011, his coworkers made racist comments against him several times a day. Ferguson Deposition Transcript ("Ferguson Depo.") 67:25-69:22. Specifically, Plaintiff recalls that his coworkers, Mario and Jose, called him a "mayate" (which Plaintiff believes is Spanish for "nigger"), a "cockroach," and a "black bug." Id. at 65:21-24. Further, Plaintiff alleges that from February 2008 until January 2011, an assistant manager for Defendant, Fernando, called him a "mayate" several times a day. Id. at 86:19:87:22.

On June 17, 2010, Plaintiff filed a complaint with Defendant regarding the inappropriate comments being made against him. Notice of Lodgment of Exhibits ("NOL"), Ex. 23. On or about November 2010, Plaintiff claims that someone put a noose on a forklift at his work. Ferguson Depo. 91:16-92:6. About a month later, in December 2010, two individuals from Defendant's corporate office interviewed all of the unloaders and investigated the noose incident as well as the racist comments being said to Plaintiff. Id. at 93:5-14. Plaintiff was interviewed in this investigation, and

shortly thereafter, in January 2011, Fernando was fired as assistant manager. Id. at 71:5-72:16.

However, Plaintiff claims that the racist comments against him did not stop even after Fernando was fired, because his coworker, Jose, continued to call him racial names up until March 2011. Id. at 73:17-23. Although Plaintiff complained to an assistant manager, Sylvia Pope, Plaintiff argues that nothing was done. Id. at 77:3-77:25.

Notwithstanding his generally adequate performance reviews, Plaintiff was written up throughout his employment with Defendant for meal and rest break violations, productivity issues, disrespecting coworkers, poor business judgment, and profanity. NOL, Ex. 16. Further, Plaintiff was written up on January 23, 2011 for mishandling company equipment and on March 2, 2011 for failing to follow policies regarding time clock and payroll procedures. Id.

On or about March 8, 2011, pursuant to Defendant's "Coaching for Improvement" policy, Plaintiff was questioned for three hours regarding harassment, using profane language, participating in inappropriate physical activities (including slapping and rough-housing with associates under his authority), failing to report associates with weapons, and becoming involved in several altercations, which violated Defendant's Statement of Ethics and its Discrimination/Harassment Prevention policies. SUF #

19, 21. On March 8, 2011, Defendant decided to terminate Plaintiff for "gross misconduct," effective March 9, 2011 ("March 2011 discharge"). Id. at # 19, 21. However, after Plaintiff was questioned on March 8, 2011, he "felt ill." Id. at # 20. Plaintiff was diagnosed with anxiety on March 9, 2011 (Id. at # 9, 22), and his doctor recommended that he be placed off work from March 9, 2011 through March 27, 2011. NOL, Ex. 6.

Plaintiff claims that when he gave Defendant the paperwork for his medical leave on March 9, 2011, Sylvia Pope, who was an assistant manager for Defendant, fired him. Ferguson Depo. 98:8-10; SUF # 23. The next day, on March 10, 2011, Plaintiff utilized Defendant's "Open Door Policy" to explain his position regarding the investigation and discharge and his need to take a medical leave of absence. Ferguson Depo. 115:18-116:1. Plaintiff spoke with Defendant's market manager, Chad, who said he would investigate Plaintiff's March 8, 2011 investigation, Sylvia Pope's refusal to accept Plaintiff's medical leave paperwork, and Plaintiff's termination. Id. at 116:2-117:18. On or about March 21, 2011, Defendant's store manager, John, spoke with Plaintiff and offered him his job back, but Plaintiff told him that he could not come back to work because he was already on sick leave. Ferguson Depo. 124:14-16. That same day, Defendant granted Plaintiff's leave of absence from work, and

told Plaintiff to tell Defendant when he was clear to return to work. Id. at 127:14-25. Defendant later granted Plaintiff's request to extend his leave period from March 9, 2011 to July 20, 2011. NOL, Ex. 1 (Ferguson Depo. 140:3-141:9); Ex. 22.

Plaintiff did not attempt to return to work until on or about September 2011. NOL, Ex. 31. On that date, Plaintiff worked for thirty minutes before being told by a personnel officer that he had to clock out and leave. Ferguson Depo. 34:1-37:21. Defendant asserts that it could not permit Plaintiff to work in September 2011 without Plaintiff first providing a medical release in accordance with its Leave of Absence/FMLA policy, which he failed to provide. NOL, Ex. 15.

Plaintiff was finally released to return to work by his doctor on or about November 30, 2011. Id. at # 28. However, Plaintiff did not return to work when he was medically released to do so. NOL, Exs. 7, 18, 31. Defendant sent Plaintiff a letter on or about January 11, 2012, which informed Plaintiff that his leave of absence expired on July 20, 2011, and if Plaintiff did not return to work or contact a salaried member of management within three days of receipt of the letter, Plaintiff's employment could end. SUF # 29. Plaintiff did not respond to the January 11, 2012 letter, and was discharged for job abandonment on or about January 25, 2012 ("January 2012 discharge"). Id. at # 31.

Prior to Plaintiff's ultimate termination for job abandonment, Plaintiff filed two complaints with the Equal Employment Opportunity Commission ("EEOC") against Defendant. On July 28, 2011, while Plaintiff was on medical leave, Plaintiff filed a charge with the EEOC alleging disability discrimination and retaliation ("First Charge"). Id. at # 1. On or about August 11, 2011, Plaintiff was issued a right-to-sue letter from the EEOC, in response to the First Charge. Id. at # 2.

On or about January 3, 2012, Plaintiff filed another charge with the EEOC, alleging race discrimination, retaliation, and disability discrimination ("Second Charge"). Id. at # 4. Plaintiff's EEOC charge on January 3, 2012 was referred to the California Department of Fair Employment and Housing ("DFEH") which issued Plaintiff a right-to-sue letter on February 9, 2012. Id. at # 5.

On May 22, 2012, Plaintiff filed the instant Action against Defendants alleging four causes of action: (1) Disability Discrimination in violation of the American Disability Act ("ADA"), (2) Violation of the Family Medical Leave Act ("FMLA"), (3) Race Discrimination, and (4) Retaliation [1]. On October 7, 2013, Defendant filed the instant Motion for Summary Judgment or in the Alternative, Partial Summary Judgment [27], which was taken under submission on November 11, 2013 [35].

II. LEGAL STANDARD

Summary judgment is appropriate when there is no

genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is "material" for purposes of summary judgment if it might affect the outcome of the suit, and a "genuine issue" exists if the evidence is such that a reasonable fact-finder could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence, and any inferences based on underlying facts, must be viewed in the light most favorable to the opposing party. Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1329 (9th Cir. 1983).

Where the moving party does not have the burden of proof at trial on a dispositive issue, the moving party may meet its burden for summary judgment by showing an "absence of evidence" to support the non-moving party's case. Celotex v. Catrett, 477 U.S. 317, 325 (1986).

The non-moving party, on the other hand, is required by Fed. R. Civ. P. 56(c) to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. Id. at 324. Conclusory allegations unsupported by factual allegations are insufficient to create a triable issue of fact so as to preclude summary judgment. Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993). A non-moving party who has the burden of proof at trial must present enough evidence that a "fair-minded jury could return a verdict for the [non-moving party] on the

evidence presented." Anderson, 477 U.S. at 255. Where a motion for summary judgment is grounded on the assertion that the non-moving party has no evidence, the non-moving party may defeat the motion by "calling the Court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party." Celotex, 477 U.S. at 332.

In ruling on a motion for summary judgment, the Court's function is not to weigh the evidence, but only to determine if a genuine issue of material fact exists. Anderson, 477 U.S. at 255.

III. ANALYSIS

A. Request for Judicial Notice

Under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." (Lee v. City of L.A., 250 F.3d 668, 689 (9th Cir. 2001)), and a court must take judicial notice of facts "if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). A fact is appropriate for judicial notice only if it is not subject to reasonable dispute in that it is (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

Defendant requests this Court take judicial notice of (1) the First and Second Charges filed with the EEOC, (2) the right-to-sue letters on the First and

Second Charges, (3) Plaintiff's Complaint [1] (4) Plaintiff's First Amended Complaint [18]. Because these documents are not subject to reasonable dispute and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, the Court **GRANTS** Defendant's request for judicial notice.

B. Motion for Summary Judgment

Based on the undisputed facts and the following analysis, the Court **GRANTS in part and DENIES in part** Defendant's Motion for Summary Judgment.

1. Disability Discrimination

As a preliminary matter, the Court must determine whether Plaintiff's claims for disability discrimination and retaliation are time-barred. Title VII and the ADA obligate Plaintiff to file a timely administrative charge of discrimination with the EEOC. MacDonald v. Grace Church Seattle, 457 F.3d 1079, 1081 (9th Cir. 2006). Title VII establishes two potential limitations periods within which a plaintiff must file an administrative charge. Id. (citing 42 U.S.C. § 2000e-5(e)(1)). Generally, a Title VII plaintiff must file an administrative charge with the EEOC within 180 days of the last act of discrimination. Id. at 1082. However, the limitations period is extended to 300 days if the plaintiff first institutes proceedings with a "state or local agency with authority to grant or seek relief from such practice." Id. Failure to timely

exhaust is treated as a violation of a statute of limitations, though leaving open defenses such as equitable tolling and estoppel. See Draper v. Coeur Rochester, 147 F.3d 1104, 1107 (9th Cir. 1998).

Further, Title VII obligates Plaintiff to file a civil action in federal court within ninety days of receiving a right-to-sue letter from the EEOC. Nelmida v. Shelly Eurocars, Inc., 112 F.3d 380, 383 (9th Cir. 1997). This ninety day period is a statute of limitations. Id. Therefore, if a claimant fails to file the civil action within the ninety day period, the action is barred. Id.

Defendant asserts that Plaintiff's disability discrimination and retaliation causes of action were filed with the EEOC on July 28, 2011 ("First Charge"). NOL, Ex. 2. Plaintiff received a right-to-sue letter on his First Charge on August 11, 2011. NOL, Ex. 3. Defendant asserts that because Plaintiff filed this Action on May 22, 2012, 285 days after he was issued the right-to-sue letter, Plaintiff's causes of action for disability discrimination and retaliation for opposing disability discrimination are time-barred.

Although unclear, Plaintiff appears to argue in Opposition that the discrimination was ongoing and the continuing violations doctrine equitably tolls the 90-day filing requirement. Opp'n 6:13-25. However, Plaintiff's argument is unavailing. The continuing violations doctrine addresses the issue of whether or

not a claimant has timely filed a charge within the statutory 180-day (EEOC) or 300-day (state agency) period from the last discrete act of discrimination, or during an ongoing claim of a hostile work environment. Edwards v. Tacoma Public Schools, No. C04-5656 RBL, 2006 WL 3000897, at *3 (W.D. Wash. Oct. 20, 2006). The doctrine does not apply to the 90-day limitation period which runs from the date the EEOC or state agency issues its "right-to-sue" letter. Id. Thus, the Court finds that the continuing violations doctrine does not apply to Plaintiff's failure to file his lawsuit in this Court with regard to the claims contained in the First Charge. See Edwards, 2006 WL 3000897, at *3. Accordingly, the Court **GRANTS** Defendant's Motion as to Plaintiff's claims for disability discrimination and retaliation for opposing unlawful disability discrimination because they are time-barred.

Even assuming, *arguendo*, that Plaintiff's cause of action for disability discrimination is not time-barred, this cause of action still fails as a matter of law.

To establish a prima facie disability discrimination, Plaintiff must show that he (1) is a disabled person within meaning of the ADA, (2) is a qualified individual, meaning he can perform the essential functions of his job, and (3) the employer terminated his employment because of his disability. Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1246

(9th Cir. 1999).

If Plaintiff can set forth a prima facie case of disability discrimination, Defendant must articulate a legitimate, nondiscriminatory reason for discharging Plaintiff. Snead v. Metropolitan Property & Cas. Ins. Co., 237 F.3d 1080, 1093 (9th Cir. 2001). If the Defendant meets this burden, then the burden shifts back to Plaintiff to demonstrate a triable issue of fact as to whether such reasons are pretextual. Pardi v. Kaiser Permanente Hosp., Inc., 389 F.3d 840, 849 (9th Cir. 2004).

As part of his burden, Plaintiff is required to show that he is a disabled person within the meaning of the ADA. The ADA defines "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2).

The ADA does not define the terms "physical or mental impairment" or "substantially limits." See 42 U.S.C. §§ 12101–12102. However, the Ninth Circuit has considered the federal regulations that define "disability" under the pre-ADA Rehabilitation Act of 1973 such as 45 C.F.R. § 84.3. Fraser v. Goodale, 342 F.3d 1032, 1038 (9th Cir. 2003). Under 45 C.F.R. § 84.3(j)(2)(i), the phrase "physical or mental impairment" means any physiological disorder or

condition that affects enumerated body systems, or "any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

To be substantially limited in a major life activity means that a person must be unable to perform a major life activity. Shapiro v. Abraham Lincoln University School of Law, No. CV 10–03177–JGB (FMOx), 2013 WL 4197098, at *8 (C.D. Cal. Aug. 12, 2013). Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Fraser, 342 F.3d at 1038 (citing 45 C.F.R. § 84.3(j)(2)(ii)).

With respect to his alleged disability, Plaintiff offers a self-serving declaration in which he describes the symptoms of his alleged disability - that he became "very ill with depression, headaches, anxiety-disorder, irritable bowel syndrome, and backache." Ferguson Decl. ¶ 9. However, Plaintiff does not offer any evidence - through his deposition testimony, a declaration, or otherwise - of any effects that his alleged disability had on the activities of central importance to his daily life. For example, he proffers no facts showing that he could not sleep, feed himself, bathe, walk, see, dress himself, speak, or perform manual tasks. In addition, Plaintiff has presented no evidence to show that his alleged disability affected his ability to perform not only his job, but any job.

On the contrary, the evidence shows that Plaintiff was able to voluntarily commence full-time employment with another employer in December 2011. NOL, Exs. 8, 9. With respect to the report in which his doctor, Dr. Chun, diagnosed Plaintiff with anxiety (NOL, Ex. 6), Dr. Chun does not specify how Plaintiff's diagnosis substantially limits a major life activity; rather, the report only specifies the dates of his medical leave. See NOL, Ex. 6. Further, the note from Plaintiff's doctor, Dr. Curtis, extending his medical leave to July 20, 2011, also does not specify how Plaintiff's diagnosis substantially limits a major life activity. See Ferguson Decl., Ex. 3.

Accordingly, because Plaintiff has failed to create a genuine issue of material fact as to whether he qualifies as "disabled" under the ADA, the Court **GRANTS** Defendant's Motion as to Plaintiff's cause of action for disability discrimination.

2. Violation of the FMLA

The FMLA creates two interrelated substantive employee rights: (1) the employee has a right to twelve work-weeks of leave in a twelve month period for an employee's own serious illness or to care for family members; and (2) the employee has a right to return to his or her job or an equivalent job after taking such leave. 29 U.S.C. §§ 2612(a), 2614(a); Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1119 (9th Cir. 2001).

In order to prevail on his claim for violations of

the FMLA, Plaintiff must demonstrate that his FMLA protected leave was a negative factor in Defendant's decision to discharge him. Bachelder, 259 F.3d at 1125. Plaintiff can prove this claim by using either direct or circumstantial evidence, and no scheme shifting the burden of production back and forth is required. Id.

Here, Plaintiff does not demonstrate that his FMLA protected leave was a negative factor in Defendant's decision to discharge him on March 8, 2011. Plaintiff asserts that on March 9, 2011, his doctor recommended that he take time off work for 3 weeks due to his stress/anxiety. Ferguson Decl. ¶ 9. He then asserts that when he attempted to turn in his form requesting medical leave on March 9, 2011, his assistant managers initially refused to accept his paperwork. Opp'n 8:8-10; Ferguson Decl. ¶¶ 10, 11, 12. Defendant provides evidence that it made the decision to terminate Plaintiff's employment on March 8, 2011, effective on March 9, 2011. NOL, Ex. 17. Further, Defendant's evidence shows that upon learning of Plaintiff's stress/anxiety diagnosis, Defendant reinstated Plaintiff's employment and granted him a medical leave from March 9, 2011 until July 20, 2011. NOL, Ex. 1 (Ferguson Depo. 140:3-141:9); Ex. 22.

Thus, is unclear to the Court how Plaintiff's allegations support the proposition that Plaintiff's FMLA protected leave was a negative factor in

Defendant's decision to discharge Plaintiff, when that decision was made on March 8, 2011, before Plaintiff obtained his stress/anxiety diagnosis. See NOL, Exs. 6 17. Plaintiff does not provide any evidence showing that the decision to discharge Plaintiff was made *after* he made his request for medical leave. Thus, because the decision to discharge Plaintiff was made *before* Plaintiff obtained his stress/anxiety diagnosis, and because Defendant reinstated Plaintiff upon learning of this diagnosis, Plaintiff has not demonstrated that his FMLA protected leave was a negative factor in Defendant's decision to discharge him on March 8, 2011.

As to the January 2012 discharge, Plaintiff fails to provide the Court with any direct or circumstantial evidence to support Plaintiff's cause of action for violation of the FMLA. Rather, the record shows that as of January 11, 2012, Plaintiff remained on approved FMLA leave, beyond the statutorily mandated twelve week period. NOL, Exs. 18, 21, 22. Plaintiff admits that he was released to return to work on November 30, 2011, but did not return to work or contact Defendant regarding his work status even after Defendant sent him a letter on January 11, 2012 requesting that Plaintiff do so. NOL, Exs. 1, 7, 18. Defendant asserts that it decided to ultimately discharge Plaintiff on or about January 25, 2012 due to job abandonment (NOL, Ex. 19), and Plaintiff provides no other evidence to show that Plaintiff's FMLA leave was a factor in that decision.

Accordingly, because Plaintiff fails to provide the Court with any direct or circumstantial evidence that his FMLA protected leave was a negative factor in Defendant's decision to discharge Plaintiff on March 8, 2011 or January 25, 2012, Plaintiff raises no genuine issue of material fact and the Court **GRANTS** Defendant's Motion as to Plaintiff's cause of action for violation of the FMLA.

3. Statutory Race Discrimination

As a preliminary matter, the Court should determine whether Plaintiff's causes of action for statutory race discrimination and retaliation for filing charges for statutory race discrimination are time barred. Defendant maintains that Plaintiff filed the Second Charge with the EEOC on January 3, 2012, alleging race discrimination, disability discrimination, and retaliation. Ferguson Decl., Ex. 4. Although Defendant cites to the date on the right-to-sue letter (which was February 9, 2012), the notice actually indicates that the letter was *mailed* on February 22, 2012. Id. The notice also indicates that Plaintiff must file a lawsuit under Title VII "within 90 days of [Plaintiff's] receipt of this notice." Id. Thus, it appears that Plaintiff did not receive the letter until after February 22, 2012. Because this Action was filed on May 22, 2012, the Court finds that Plaintiff's causes of action for statutory race discrimination and retaliation for opposing race discrimination are within

the 90 day time period and are not time-barred. See 42 U.S.C. § 2000e-5(f)(1).

a. *Racial discrimination pursuant to a "disparate treatment" theory*

Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1); Aragon v. Republic Silver State Disposal, 292 F.3d 654, 658 (9th Cir. 2002). To establish prima facie racial employment discrimination, Plaintiff must show that (1) he belongs to a protected class, (2) he was qualified for the position, (3) he was subjected to an adverse employment action, and (4) that "similarly situated individuals outside [their] protected class were treated more favorably or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Aragon, 292 F.3d at 658.

If Plaintiff can set forth a prima facie case, the burden of production shifts to Defendant to articulate a legitimate, nondiscriminatory reason for discharging Plaintiff. McDonnell, 411 U.S. at 802. If the Defendant meets this burden, then Plaintiff has the burden to set forth specific and substantial evidence that Defendant's reasons are really a pretext for

racial discrimination. Aragon, 292 F.3d at 661.

As to the first element, both Parties do not dispute that Plaintiff, as an African-American individual, is a member of a protected class. As for the second element, Plaintiff successfully alleges that he was qualified for the position as a truck unloader, given that Defendant has admitted that Plaintiff performed competently in his work and earned pay raises. SUF ## 44, 47, 48. Third, Plaintiff successfully alleges that he was subject to an adverse employment action - that he was initially terminated on or about March 9, 2011 (SUF ## 19, 21,) and that he was ultimately terminated on or about January 25, 2012. SUF # 31.

As to the fourth element - whether similarly situated employees engaged in similar conduct but received favorable treatment or whether circumstances existed suggesting a discriminatory motive - Plaintiff provides no evidence that Defendant's decision to terminate Plaintiff on March 8, 2011 (effective March 9, 2011), or its decision to terminate Plaintiff on or about January 25, 2012 was racially motivated. However, Plaintiff does provide evidence that his boss, Veronica, would treat Mexican employees better than she treated other employees, such that if Plaintiff called in sick, he would get written up, but Mexican associates called in sick often and were never reprimanded. Ferguson Depo. 59:18-62:3. Thus, viewing

the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff has provided some evidence, albeit very little evidence, that similarly situated individuals outside of Plaintiff's protected class were treated more favorably. Accordingly, Plaintiff has met his burden of setting forth a prima facie case.

Even though the Court finds that Plaintiff has established a prima facie case for race discrimination, it also finds that Defendant has articulated a legitimate, non-discriminatory reason for initially discharging Plaintiff on March 8, 2011, and for ultimately discharging Plaintiff on or about January 25, 2012. Specifically, Defendant maintains that it fired Plaintiff on March 8, 2011 after an investigation found that he engaged in "gross misconduct." NOL, Ex. 17. The exit interview taken on March 8, 2011 does not indicate that Plaintiff was discharged due to his race; rather, Plaintiff was investigated for payroll integrity, harassment, using profane language, and his involvement in physical activities such as rough housing with associates under his authority. NOL, Ex. 17. Further, after reinstating Plaintiff's employment, Defendant argues that it ultimately terminated Plaintiff's employment in January 2012 for "job abandonment" after he failed to respond to Defendant's January 11, 2012 letter requesting that he return to work or inform Defendant of his employment status.

NOL, Ex. 19. Neither the January 11, 2012 letter nor the exit interview taken prior to Plaintiff's January 2012 termination indicate that race played any factor in Defendant's employment decisions with regard to Plaintiff. NOL, Ex. 17, 18. Rather, the evidence shows that Defendant's decision to terminate Plaintiff was based on Plaintiff's failure to return to work.

Because Defendant has articulated legitimate, non-discriminatory reasons for its employment decisions, Plaintiff bears the burden to show that there is a genuine dispute of material fact that Defendant's reasons are merely a pretext for race discrimination. Here, Plaintiff has offered no direct evidence that Defendant's employment decisions were merely pretext for race discrimination. Because he relies on circumstantial evidence of discrimination, Plaintiff must provide "specific and substantial" evidence of pretext. Aragon, 292 F.3d at 661. Plaintiff fails to meet his burden. Plaintiff points out that he was subjected to numerous racial slurs by his coworkers and refers to another incident in which a noose was placed on a forklift at work that occurred in or about November 2010. Ferguson Depo., 90:15-93:9. However, Plaintiff does not deny that corrective action was taken six months later, in or about January 2011, when a harassing manager was discharged. Id.; Ferguson Depo., 75:25-76:2. Other than these allegations, Plaintiff fails to address how Defendant's reasons for

its decisions to terminate Plaintiff in March 2011 and January 2012 were merely a pretext for racial discrimination. Thus, the Court finds that the allegations raised by Plaintiff do not constitute the "specific and substantial" evidence of pretext that Plaintiff needs in order to survive summary judgment.

b. *Racial discrimination pursuant to a "hostile work environment" theory*

However, Plaintiff could sustain his Title VII action under a hostile work environment theory of liability. Under this theory, Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

To make a prima facie case of a hostile work environment, a person must show that: (1) he or she was subjected to verbal or physical conduct of a racial nature, (2) this conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Manatt v. Bank of America, NA, 339 F.3d 792, 798 (9th Cir. 2003). Additionally, the working environment must both subjectively and objectively be perceived as abusive. Harris, 510 U.S. at 21-22.

In order to survive summary judgment, Plaintiff

must show the existence of a genuine factual dispute as to: 1) whether a reasonable African-American man would find the workplace so objectively and subjectively racially hostile as to create an abusive working environment, and 2) whether Defendant failed to take adequate remedial and disciplinary action. See McGinest v. GTE Service Corp., 360 F.3d 1103, 1113 (9th Cir. 2004).

The Court notes that Defendant makes several evidentiary objections to Plaintiff's Declaration with respect to his allegations that his coworkers and assistant manager called him racist names (i.e., "mayate," "black bug," and "cockroach") on the grounds that these statements are inadmissible hearsay. See Def.'s Evidentiary Objections to Ferguson Decl. ("Def.'s Objections") ¶¶ 3, 4, 6. However, the Court **OVERRULES** these hearsay objections, because these statements are not offered for the truth of the matter asserted and do not constitute hearsay. See Fed. R. Evid. 801.

Here, Plaintiff makes out a prima facie case of a hostile work environment. First, Plaintiff indicates in his deposition testimony that he was subjected to verbal conduct of a racial nature; specifically, that his coworkers and his assistant manager, Fernando, called him racist names, such as "cockroach," "black bug," and "mayate," - which Plaintiff claims is the Spanish word for "nigger." Ferguson Depo., 65:1-69:19;

87:4-20, 89:3-23. Second, Plaintiff indicates that this conduct was unwelcome and offensive to him. Ferguson Depo., 68:7-25. Third, Plaintiff establishes subjective hostility by offering the June 2010 complaint that he made to Defendant, in which Plaintiff complains that the derogatory comments make it "very difficult to work in the backroom." Ferguson Decl., Ex. 1. Further, Plaintiff indicates that using the term, "cockroach" was offensive to him and had a racial meaning. See Ferguson Depo., 68:15-69:1; See McGinest, 360 F.3d at 1113.

In evaluating the objective hostility of a work environment, the factors to be considered include the "frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." McGinest, 360 F.3d at 1113. "The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct." Id. Considering the facts in the light most favorable to Plaintiff, the Court finds that the incidents described are sufficient to survive a motion for summary judgment. Specifically, Plaintiff asserts that someone put a noose on the forklift sometime around November 2010. Ferguson Depo., 90:15-93:9. Further, Plaintiff indicates that he was called a "mayate" by his coworkers three or four times a day from February 2008

to March 2011. Ferguson Depo., 68:3-6. Although "[n]ot every insult or harassing comment will constitute a hostile work environment," "[r]epeated derogatory or humiliating statements . . . can constitute a hostile work environment." McGinest, 360 F.3d at 1115. Accordingly, the Court finds that Plaintiff provides sufficient evidence to create a genuine issue of material fact that a reasonable African-American would find the workplace so objectively and subjectively racially hostile as to create an abusive working environment.

i. *Remedial measures*

Having determined that Plaintiff has presented a triable issue of whether he was subjected to a hostile work environment, the Court must decide whether Defendant can be liable for the harassment. Little v. Windermere Relocation Inc., 301 F.3d 958, 968 (9th Cir. 2001) (citing Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001)); See also Meritor, 477 U.S. at 70-72 (noting that a Title VII plaintiff must also provide a basis for holding her employer liable for the harassment).

An employer's liability for harassing conduct is evaluated differently when the harasser is a supervisor as opposed to a coworker. McGinest, 360 F.3d at 1119. An employer is vicariously liable for a hostile environment created by a supervisor, although such liability is subject to a two-pronged affirmative

defense - (1) "that the employer exercised reasonable care to prevent and correct promptly any harassing behavior;" and (2) "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." See Nichols, 256 F.3d at 877.

Here, Plaintiff argues that Fernando, his assistant manager, made several racial slurs against him - beginning from February 2008 until January 2011. Ferguson Depo., 89:10-23. Although Defendant argues that Fernando was eventually fired on January 2011, Plaintiff had complained about Fernando as early as June 17, 2010. Ferguson Decl., Ex. 1. Further, it appears to the Court that it was not until December 2010 that Defendant investigated these racial comments. Ferguson Depo. 72:10-12. As such, the Court finds that Plaintiff has raised a genuine issue that Defendant did not promptly correct Fernando's harassing behavior.

As to liability for actions by coworkers, "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." McGinest, 360 F.3d at 1119. An employer may nonetheless avoid liability for such harassment by undertaking remedial measures "reasonably calculated to end the harassment." Id. "The reasonableness of the remedy depends on its ability to: (1) 'stop harassment by the person who

engaged in the harassment;' and (2) 'persuade potential harassers to refrain from unlawful conduct.'" Id. To be adequate, an employer must intervene promptly. Id. (citing Intlekofer v. Turnage, 973 F.2d 773, 778 (9th Cir. 1992)).

Plaintiff indicates that after his assistant manager, Fernando, was fired in January 2011, his coworker, Jose, continued to call him racial names. Ferguson Depo., 74:7-11. Plaintiff also asserts that even though he complained to his assistant manager, Sylvia Pope, on or about January 2011, Jose continued to call him racist names. Ferguson Depo., 74:7-78:3. Accordingly, based on Plaintiff's deposition testimony, it appears that Sylvia Pope may have known about the continued use of racial slurs against Plaintiff, but took no remedial action. As such, the Court finds that Plaintiff has raised a genuine issue that Defendant did not promptly stop harassment by Plaintiff's coworkers.

Based on the foregoing, the Court **DENIES** Defendant's Motion as to Plaintiff's statutory race discrimination claim on the grounds that Plaintiff has provided sufficient evidence to sustain a claim for violation of Title VII under a hostile work environment theory.

4. Retaliation

The anti-retaliation provisions of Title VII forbid retaliation against an employee or job applicant who has made a charge, testified, assisted, or participated

in a Title VII proceeding or investigation. 42 U.S.C. § 2000e-3(a); Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 56 (2006). The plaintiff must establish a prima facie case of retaliation by demonstrating: 1) he engaged or was engaging in activity protected under Title VII, 2) the employer subjected him to an adverse employment decision, and 3) there was a causal link between the protected activity and the employer's action. Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987).

To establish causation between a protected act and an adverse employment action, Plaintiff must demonstrate that engaging in the protected activity was one of the reasons for the adverse employment action. Villiarimo v. Aloha Island Air, 281 F.3d 1054, 1064-65 (9th Cir. 2002). The Ninth Circuit has recognized that in some causes, causation can be inferred from timing alone; however, the adverse employment action must have occurred fairly soon after the employee's protected expression. Id.

If the plaintiff establishes a prima facie case, the burden shifts to the employer to offer a legitimate non-retaliatory reason for the adverse employment action. Davis v. Team Elec. Co., 520 F.3d 1080, 1088-89, 1091 (9th Cir. 2008). If the employer offers such a reason, the burden then shifts back to the plaintiff to show that there is a genuine dispute of material fact as to whether the employer's proffered reason for

the challenged action is pretextual. Id. at 1091.

Plaintiff bases his fourth cause of action for retaliation for filing a workers' compensation charge, complaining of race discrimination against Defendant, and for filing the First and Second Charges with the EEOC. Compl. ¶ 29.

i. *Retaliation for filing a Worker's Compensation claim*

Here, Plaintiff fails to set forth a prima facie case of retaliation for filing a workers' compensation charge. Plaintiff references the workers' compensation case in his deposition, in which he acknowledges that he was deposed with regard to the workers' compensation case sometime in 2012. Ferguson Depo. 5:16-6:1. Plaintiff also indicates that the workers' compensation case had since been resolved on or about June 7, 2013 through a settlement for $8,000. Ferguson Depo. 6:11-21. Other than referencing the workers' compensation claim in his deposition, Plaintiff provides no evidence whatsoever to support that there was a causal link between his request for workers' compensation and Defendant's decision to terminate Plaintiff on March 8, 2011, for Defendant's decision to refuse to allow him to return to work on or about September 2011, or for Defendant's decision to ultimately terminate Plaintiff on or about January 25, 2012. Absent such evidence, it would be impossible for the Court to find a genuine issue of material fact that Defendant retaliated

against Plaintiff for filing the workers' compensation claim. As such, the Court **GRANTS** Defendant's Motion as to Plaintiff's claim for retaliation for filing a workers' compensation charge.

ii. *Retaliation for opposing unlawful race discrimination*

Moreover, Plaintiff fails to set forth a prima facie case of retaliation for complaining of race discrimination against Defendant. Here, Plaintiff is able to show that he was engaged in a protected activity under Title VII, specifically, that he (1) complained to Defendant on or about June 2010 about racial slurs being said against him (Ferguson Decl., Ex. 1) and (2) that he participated in an investigation on or about December 2010 against the employees who made these racial slurs. Ferguson Depo. 71:5-72:16. Further, Plaintiff provides evidence that Defendant subjected him to an adverse employment decision, specifically, that Defendant (1) discharged him on March 9, 2012, (2) refused to allow Plaintiff to return to work on or about September 2011, and (3) ultimately terminated Plaintiff on or about January 25, 2012.

However, Plaintiff does not show that there was a causal link between Plaintiff's protected activities and Defendant's employment decisions. See Yartzoff, 809 F.2d at 1375. Plaintiff does not provide any evidence supporting a causal link, other than referring to the date that Plaintiff filed his complaint for

racist comments (June 2010) and the dates that Plaintiff was discharged (March 2011 and January 2012). To establish causality based on temporal proximity between an employer's knowledge of the protected activity and an adverse employment action, the temporal proximity must be very close. Richmond v. Oneok, 120 F.3d 205, 209 (10th Cir. 1997) (recognizing that three month period between the protected activity and the termination, standing alone, does not establish a causal connection). Here, the March 8, 2011 discharge occurred eight months after Plaintiff first complained of the racist comments and three months after his participation in the investigation of these racist comments. SUF ## 51, 21. Thus, there is insufficient proximity between the two events to raise the inference that the protected complaint or participation led to the discharge.

To the contrary, it appears that after Plaintiff made his complaints for racist comments, Defendant investigated the situation in December 2010 and terminated an employee who made these racist comments. Ferguson Depo., 71:2-10. Finally, Plaintiff obtained two merit-based pay increases (SUF # 50) and was promoted to Inventory Supervisor after the investigation. SUF # 53. As to Plaintiff's claims that Defendant refused to allow Plaintiff to return to work on or about September 2011, and that Defendant ultimately terminated Plaintiff in January 2012,

Plaintiff similarly fails to provide any evidence to support a causal link between Plaintiff's protected activity of opposing race discrimination and Defendant's employment decisions. Accordingly, because Plaintiff has failed to set forth a prima facie case of retaliation for opposing race discrimination, the Court **GRANTS** Defendant's Motion as to this cause of action.

iii. *Retaliation for filing the First Charge*

As to Plaintiff's claim of retaliation for filing the First Charge with the EEOC, the Court finds that Plaintiff sets forth a prima facie case. First, Plaintiff has provided sufficient evidence that he was engaged in activity protected under Title VII - specifically, that he filed the First Charge with the EEOC opposing unlawful disability discrimination. Ferguson Decl., Ex. 2. Second, Plaintiff has provided evidence that Defendant subjected him to an adverse employment decision - that he was prevented from coming back to work on or about September 2011. Ferguson Depo., 37:12-14, 38:9-39:19. Third, there appears to be a causal link between the protected activity and the employer's action, albeit a tenuous one, because Plaintiff filed the First Charge with the EEOC on or about July 28, 2011 (Ferguson Decl., Ex 2), and Plaintiff was allegedly prevented from returning to work on or about September 2011. Thus, the Court finds that Plaintiff has established a prima facie case of retaliation for filing the First Charge.

Therefore, because Plaintiff successfully sets forth a prima facie case of retaliation for filing the First Charge with the EEOC, Defendant must articulate a "legitimate, nondiscriminatory" reason for its employment decisions. See McDonnell, 411 U.S. at 802. As to Plaintiff's March 8, 2011 discharge, Defendant argues that it fired Plaintiff for "gross misconduct." Defendant also acknowledges that although Plaintiff attempted to return to work sometime on or about September 2011, Defendant argues that it did not let Plaintiff return to work because he did not provide Defendant with a medical release to do so; rather, Defendant alleges that Plaintiff was eligible to be released to work only as early as October 31, 2011. NOL, Ex. 7. As for the January 2012 discharge, Defendant argues that it fired Plaintiff for "job abandonment." NOL, Ex. 19.

Thus, Plaintiff has the burden of demonstrating a triable issue of fact as to why Defendant's reason is merely a pretext for retaliation. The Court notes that Defendant objects to Plaintiff's entire declaration, arguing that Plaintiff cannot utilize a declaration which contradicts his own sworn deposition testimony. Def.'s Objections ¶ 1. The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his own prior deposition testimony. Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991). If a party, who was examined

at length on deposition, were allowed to raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact. Id.

Plaintiff attempts to provide direct evidence of pretext. Specifically, Plaintiff indicates in his declaration that he was released to return to work by his doctor on or about July 22, 2011, and after presenting his work release papers to his manager, he was told to go to work. Ferguson Decl. ¶ 14. Plaintiff later indicates in his declaration that 30 minutes later, Sylvia Pope, the assistant manager, told him to stop working because he "filed a lawsuit against them." Ferguson Decl. ¶ 14. However, Plaintiff's declaration, executed on October 27, 2013, flatly contradicts his earlier deposition testimony, taken on August 7, 2013. In his deposition, Plaintiff admits that at some point in between March 9, 2011 and December 2011 (Plaintiff was unsure of the date), Plaintiff returned to work at Wal-Mart for 30 minutes. Ferguson Depo., 32:23-33:13. Plaintiff indicates that he went to the personnel office, gave a woman named Martha a slip to go back to work, clocked in, worked for 30 minutes, and was called back to the personnel office to clock out immediately thereafter. Id. at 34:7-35:7, 36:4-37:14. Plaintiff admits that when he went back to the personnel office, Sylvia Pope was

there with Martha. Id. at 37:1-11. Plaintiff notes that Martha told him that he had to clock out and leave, but did not tell him why he had to do so and that he did not ask for a reason. Id. at 37:19-38:1. Further, Plaintiff admits that *Sylvia Pope said nothing* in this discussion - "she was just standing right next to [Martha]." Id. at 37:1-11 (emphasis added). Thus, while Plaintiff asserts in his declaration that Sylvia Pope told him that he could not come back to work because he "filed a lawsuit against them," such testimony is contradictory to Plaintiff's earlier deposition testimony where Plaintiff admits that Sylvia Pope said nothing in this discussion. Id. at 37:1-11. As such, the Court **GRANTS** Defendant's objection to Plaintiff's Declaration to the extent that he declares that Sylvia Pope told him to stop working because he "filed a lawsuit against them." See Ferguson Decl. ¶ 14. Accordingly, the Court finds that Plaintiff's declaration testimony regarding Sylvia Pope's statement is improper and fails to create a genuine issue of material fact.

Accordingly, absent direct evidence of pretext, Plaintiff's burden requires that he demonstrate pretext with "specific and substantial" circumstantial evidence to defeat the Defendant's Motion. See Coghlan v. American Seafoods Co. LLC, 413 F.3d 1090, 1094–95 (9th Cir. 2005). In Plaintiff's deposition, he testified that he returned to the store four days in a row

following the day he met with Martha and Sylvia Pope in personnel. Id. at 38:11-13. He claims that he spoke with Rick, a personnel manager, and told him that he got a doctor's note release to come back to work, but that Rick said that he could not come back to work. Id. at 39:1-16. However, Plaintiff admits that Rick never told him why he could not come back to work. Id. at 39:17-19. Further, he provides a doctor's note, dated April 20, 2011, that he required leave from April 20, 2011 to July 20, 2011. Ferguson Decl., Ex. 3.

However, such circumstantial evidence is not "specific or substantial" enough to support that Defendant's proffered reasons are merely a pretext for retaliation for filing the First Charge. Plaintiff cites to a doctor's note, which was signed on April 20, 2011, indicating that he required medical leave until July 20, 2011. NOL, Ex. 22. However, the medical form does not show that Plaintiff was *eligible to return to work* on July 20, 2011. Id. Other than the doctor's note and Plaintiff's declaration, Plaintiff provides no other evidence to the Court that Defendant retaliated against Plaintiff for filing the First Charge with the EEOC. Accordingly, because Plaintiff fails to meet his burden of providing "specific and substantial" circumstantial evidence to defeat Defendant's Motion for Summary Judgment, the Court **GRANTS** Defendant's Motion as to Plaintiff's claim for retaliation for filing the First Charge with the EEOC.

iv. *Retaliation for filing the Second Charge*

As to Plaintiff's claim of retaliation for filing the Second Charge of disability and race discrimination, the Court finds that Plaintiff sets forth a prima facie case. First, Plaintiff has provided sufficient evidence that he was engaged in activity protected under Title VII - specifically, that he filed the Second Charge with the EEOC for race and disability discrimination on January 3, 2012. Ferguson Decl., Ex. 2. Second, Plaintiff has provided evidence that Defendant subjected him to an adverse employment decision - that he was fired in January 2012. Ferguson Depo., 37:12-14, 38:9-39:19. Third, there is a causal link between the protected activity and the employer's action, because the adverse employment action occurred on or about January 25, 2012, only a few weeks after Plaintiff filed the Second Charge.

Although Plaintiff successfully sets forth a prima facie case, Defendant has articulated a legitimate, nondiscriminatory reason for its decision to terminate Plaintiff on or about January 2012, which was "job abandonment." NOL, Ex. 19.

In turn, Plaintiff fails to articulate a valid argument or provide any evidence to support the proposition that Defendant's reason is merely a pretext for retaliation. To the contrary, it appears that Defendant made a good faith effort to communicate with Plaintiff only eight days *after* Plaintiff filed the

Second Charge and specifically requested that he return to work or notify Defendant of his status. NOL, Ex. 18. Plaintiff admits that he did not return to work or communicate with Defendant at any point thereafter. Ferguson Depo. 43:16-44:7. Because Plaintiff fails to provide any evidence indicating that Plaintiff's reason for discharging him in January 2012 was pretextual, Plaintiff creates no genuine issue of material fact that Plaintiff's reason was pretextual. Accordingly, the Court **GRANTS** Summary Judgment as to Plaintiff's claim for Retaliation for filing the Second Charge.

C. Evidentiary Objections

Beyond the evidentiary objections already ruled upon as a basis for reaching the Court's conclusions, the Court need not rule on any other evidentiary objections. Accordingly, the Court **DENIES as MOOT** Defendant's remaining evidentiary objections.

IV. CONCLUSION

Based on the foregoing, the Court **GRANTS in part and DENIES in part** Defendant's Motion for Summary Judgment. Specifically, the Court **GRANTS** Defendant's Motion as to Plaintiff's claims for disability discrimination, violation of the FMLA, and retaliation.

However, the Court **DENIES** Defendant's Motion as to Plaintiff's claim for statutory race discrimination. Moreover, the Court hereby extends the motion filing cut-off date from November 18, 2013 to February 3, 2014 to allow the Parties the opportunity to file any

dispositive motions with regard to Plaintiff's claim for statutory race discrimination. The Court hereby continues the Final Pretrial Conference date from January 28, 2014 to April 15, 2014 and continues the Jury Trial date from February 25, 2014 to May 20, 2014.

IT IS SO ORDERED.

DATED: January 2, 2014

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge